

United States Court of Appeals  
Fifth Circuit

**UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

**FILED**

December 13, 2010

Lyle W. Cayce  
Clerk

No. 09-41288  
Summary Calendar

D.C. Docket No. 4:08-CR-226-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

BOBBY BRANDON KINSEY,

Defendant - Appellant

Appeal from the United States District Court for the  
Eastern District of Texas, Sherman

Before KING, BENAVIDES, and ELROD, Circuit Judges.

**J U D G M E N T**

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE:

JAN 04 2011

A True Copy  
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: 

Deputy

New Orleans, Louisiana

JAN 04 2011

**FILED**  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
JAN - 6 2011  
DAVID J. MALAND, CLERK  
BY  
DEPUTY \_\_\_\_\_

IN THE UNITED STATES COURT OF APPEALS  
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Appeal from the United States District Court  
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USDC No. 4:08-CR-226-1  
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Before KING, BENAVIDES, and ELROD, Circuit Judges.

PER CURIAM:\*

Bobby Brandon Kinsey appeals his guilty plea conviction for conspiracy to possess with intent to manufacture, distribute, and dispense methamphetamine and marijuana and possession of a firearm in furtherance of a drug trafficking crime. Additionally, Kinsey seeks to challenge the sentence imposed by the district court.

Kinsey argues that the district court reversibly erred by accepting his guilty plea because there was an insufficient factual basis for the plea. He also

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\*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

argues that his trial counsel rendered ineffective assistance in connection with the guilty plea. Kinsey further argues that the waiver provision contained in the plea agreement, which the Government seeks to enforce, is invalid due to ineffective assistance of counsel.

Kinsey's challenge to the sufficiency of the factual basis is raised for the first time on appeal. Accordingly, review is for plain error. *See United States v. Palmer*, 456 F.3d 484, 489 (5th Cir. 2006). In this case, the record as a whole, including the factual basis, arraignment colloquy, and presentence report, demonstrates that Kinsey knowingly and voluntarily entered into an agreement with two or more people to violate the narcotics laws regarding the possession, manufacturing, dispensing, and distribution of methamphetamine and marijuana. *See United States v. Vonn*, 535 U.S. 55, 74 (2002); *United States v. Gallardo-Trapero*, 185 F.3d 307, 317 (5th Cir. 1999). Thus, there is a sufficient factual basis to support Kinsey's plea to conspiracy to possess with the intent to manufacture, distribute, and dispense methamphetamine and marijuana. The 60-month sentence imposed by the district court did not exceed the 20-year statutory maximum set forth in 21 U.S.C. § 841(b)(1)(C). *United States v. Turner*, 319 F.3d 716, 722-23 (5th Cir. 2003); *United States v. Solis*, 299 F.3d 420, 448 (5th Cir. 2002).

We do not consider Kinsey's argument that the factual basis was insufficient to establish that he used, carried, or otherwise employed firearms in during and in relation to a drug trafficking crime. Kinsey was charged with possession of the firearms in furtherance of a drug trafficking crime. *See United States v. McGilberry*, 480 F.3d 326, 329 (5th Cir. 2007).

We also decline to consider Kinsey's ineffective assistance of counsel claim on direct appeal. *United States v. Cantwell*, 470 F.3d 1087, 1091 (5th Cir. 2006); *see also Massaro v. United States*, 538 U.S. 500, 503-04 (2003). Finally, we do not consider Kinsey's challenge to the sentence imposed because the record

establishes that he knowingly and voluntarily waived his right to appeal. *See United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005).

AFFIRMED.

***United States Court of Appeals***  
FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE  
NEW ORLEANS, LA 70130

January 04, 2011

Mr. David Maland  
Eastern District of Texas, Sherman  
United States District Court  
216 Federal Building  
Sherman, TX 75090-0000

No. 09-41288, USA v. Bobby Kinsey  
USDC No. 4:08-CR-226-1

Enclosed, for the Eastern District of Texas, Sherman only, is a copy of the judgment issued as the mandate.

Enclosed, for the Eastern District of Texas, Sherman only, is a copy of the court's opinion.

Record/original papers/exhibits are returned:

( ) Volumes ( 1 ) Sealed Envelope ( ) Boxes

The electronic copy of the record has been recycled.

Sincerely,

LYLE W. CAYCE, Clerk

By: 

Linda B. Miles, Deputy Clerk  
504-310-7709

cc: (letter only)  
Mr. Stanley Rafe Foreman  
Mr. Ernest Gonzalez  
Ms. Traci Lynne Kenner  
Honorable Richard A. Schell

P.S. to Judge Schell: A copy of the opinion was sent to your office via email the day it was filed.

Mandate Issued - MDT-1 (!ag,tax,img)